

Honorable Robert J. Bryan

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

Angela Kee, et al.)	
)	No. C09-5130 RJB
Plaintiffs,)	
)	<i>REPLY TO PLAINTIFF</i>
v.)	<i>KEE'S RESPONSE TO</i>
)	<i>DEFENDANT'S MOTION</i>
Evergreen Professional Recoveries, Inc.)	<i>FOR ATTORNEY FEES</i>
)	
Defendant.)	
_____)	

**I.
REPLY**

A. FEES SHOULD BE AWARDED UNDER §1692k(3) BECAUSE
MS. KEE KNEW HER CLAIMS WERE MERITLESS.

REPLY TO PLAINTIFF KEE'S
RESPONSE TO DEFENDANT'S
MOTION FOR ATTORNEY FEES
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1 Fees are awarded to defendants where the court finds the claim was brought
2 in bad faith and for purpose of harassment. 15 U.S.C. §1692k(3). To award fees,
3 there must be evidence that the plaintiff knew her claim was meritless, yet pursued
4 it with the purpose of harassing the defendant. *Gorman v. Wolpoff & Abrahamson,*
5 *LLP*, 435 F. Supp.2d 1004 (N.D. Cal. 2006). That standard is met under these
6 facts:
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9 - Legal Helpers was counsel for Plaintiff in her Bankruptcy as well as
10 her FDCPA demand in September, 2008, well before this case was
11 filed;
12

13 -Legal Helpers and Plaintiff knew that she had an FDCPA claim;
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15 -Legal Helpers and Plaintiff did not disclose the FDCPA claim to the
16 bankruptcy court, trustee or creditors in the schedules filed on
17 February 13, 2009;
18

19 -Legal Helpers and Plaintiff filed this case on March 9, 2009 knowing
20 that the FDCPA claim had not been disclosed.
21

22 Dkt # 15, Exhibits 1, 2.
23
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25

26 REPLY TO PLAINTIFF KEE'S
27 RESPONSE TO DEFENDANT'S
28 MOTION FOR ATTORNEY FEES
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1 A claim that is barred by judicial estoppel is 'meritless' because the claim
2 cannot be pursued. Thus, Kee's filing and pursuit of an FDCPA claim, when she
3 had not previously disclosed that claim in her bankruptcy, make this a bad faith
4 filing. It is not necessary that the court rule on the merits of the FDCPA claims.
5

6 It is analogous to a creditor who knowingly files suit against a debtor in
7 violation of an automatic stay, or files suit after the claim has been discharged in
8 bankruptcy. The creditor cannot exempt itself from liability by referring to the
9 underlying merit of the creditor's claims. 11 U.S.C. §362(k)(1).
10

11 Fees should be awarded against Kee under §1692k(3).
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16 **B. DEFENDANT WITHDRAWS ITS REQUEST FOR FEES UNDER RULE 11**

17 Defendant gave Plaintiff Kee and her counsel written notice of the intent to
18 seek fees and costs under Rule 11 if Kee did not voluntarily dismiss her claims.
19

20 Dkt. #15, Ex. 4.

21 The purpose of the safe harbor provision is to give the opposing party or
22 attorney time to withdraw the offending document. Rule 11(c). While Defendant
23 believes that policy was fully met by serving written notice, such notice was not in
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26 REPLY TO PLAINTIFF KEE'S
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1 the form of a motion and thus may not support fees under the technical wording of
2 the Rule. Defendant voluntarily withdraws its request under Rule 11 .
3

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5
6 C. FEES UNDER 28 U.S.C. § 1927

7 Plaintiffs counsel asks that this court act sua sponte and assess fees against
8 Defendant or its counsel because it "knew" the motion was frivolous. As an initial
9 matter, the motion for fees was brought under both 15 U.S.C. §1692k(3) and Rule
10 11, so the motion was not frivolous. Secondly, Defendant did not "multiply the
11 proceedings . . . unreasonable and vexatiously", but quite the opposite. It gave
12 written notice of the judicial estoppel prior to filing the motion for summary
13 judgment in the hopes that Kee would dismiss her claims and all parties would
14 avoid the additional fees that would follow from motion practice. Rather than
15 voluntarily dismissing her claims, Kee forced Defendant to incur the additional
16 expenses of the summary judgment motion. The only party to this action who
17 unnecessarily increased the cost of litigation was Ms. Kee. No award against
18 Defendant or its counsel is warranted.
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25 **II.**

26 REPLY TO PLAINTIFF KEE'S
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28 MOTION FOR ATTORNEY FEES
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CONCLUSION

This Court should award fees against Kee under 15 U.S.C. §1692k(3), for filing this case knowing that she had not disclosed the claim to the bankruptcy court.

DATED THIS 11th day of September, 2009.

LUKE, CASTEEL & OLSEN, PSC

/s/ Kimberlee Walker Olsen

Kimberlee Walker Olsen, WSBA # 28773
Attorney for Defendant

CERTIFICATE OF SERVICE

I, Kimberlee Walker Olsen, certify that on September 11, 2009, I electronically sent, via ECF, true and correct copies of:

1. Reply to Plaintiff Kee's Response to Defendant's Motion for Attorney Fees.

to the following:

Richard J. Meier, rjm@legalhelpers.com

REPLY TO PLAINTIFF KEE'S
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MOTION FOR ATTORNEY FEES
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Attorneys for Plaintiffs Kee and Gustin

/s/ Kimberlee Walker Olsen

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REPLY TO PLAINTIFF KEE'S
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MOTION FOR ATTORNEY FEES
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